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No. 2014-03337

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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

2015 JUL 8 PM 5 21

BOSTON POLICE DEPARTMENT,
Plaintiff

v.

LENCOL MONTEIRO and
MASSACHUSETTS CIVIL SERVICE COMMISSION,
Defendants

(LAT)

**MEMORANDUM OF DECISION AND ORDER ON
CROSS MOTION FOR JUDGMENT ON THE PLEADINGS**

The Plaintiff, Boston Police Department ("BPD") has appealed from a decision of the Defendant Civil Service Commission ("the Commission"), ordering BPD to reconsider the Defendant, Lencol Monteiro ("Monteiro"), for employment as a BPD police officer after he was initially declined or "bypassed" for the position in 2014. A department psychologist, Donald Seckler, Ph.D ("Seckler"), examined Monteiro and determined that he failed his psychological screening, rendering him unfit to execute the duties of a police officer. After BPD rescinded its conditional offer of employment, Monteiro appealed his bypass to the Commission. After hearing, the Commission ordered Monteiro's bypass vacated, finding that no BPD psychological evaluator opined that Monteiro had any history of a medical condition or disorder that would interfere with his ability to perform the functions of a police officer, that Seckler based his

opinion upon inaccurate facts, and his reasons for recommending bypass were outside of the “narrowly circumscribed” role of determining whether Monteiro suffers from a psychiatric condition.

As a remedy, the Commission ordered BPD to place Monteiro at the top of any current or future Certification so that he may be processed in the round of hiring for the next available Boston Police Academy, subject to appropriate updated background, medical and psychological screening in accordance with current BPD policy in the ordinary course of the hiring process, but without the same psychological professionals.

After hearing, a review of the parties’ memoranda and the administrative record, and based on the following reasons, plaintiff BPD’s motion on the pleadings is **DENIED**, the defendants Commission and Monteiro’s Cross Motions are **ALLOWED**. As a result, the Commission’s decision is hereby **UPHELD** and the Department’s decision not to appoint Monteiro as a police officer is **VACATED**.

STATEMENT OF FACTS

After Monteiro was offered a conditional appointment to the BPD, he was subjected to a substantial background check, and as already noted, a psychological evaluation. As it is the reliability of the Psychological evaluation which is at issue, the court notes the Commission’s relevant findings in its Corrected Decision, which have not been challenged as lacking evidentiary support.

21. In this case, after taking the MMPI-2RF and PAI written tests, Mr. Monteiro was interviewed on September 13, 2013 by Dr. Andrew Brown as the first-level psychological screener. Dr. Brown is a consulting psychiatrist assisting BPD since 2006. Dr. Brown did

not testify at the Commission hearing.

22. Mr. Monteiro met with Dr. Brown on September 13, 2013.
23. At the beginning of the report Dr. Brown states, "The reader is referred to reports reflecting the applicant['s] 2010 evaluations by Drs. Scott and Johnson for pertinent background concerning this applicant".
24. Dr. Brown states that the "Reason for Referral" is to assess whether the applicant is "well suited to serve" as a BPD police officer.
25. Dr. Brown reported the following "relevant history" gleaned from his review of the BPD background investigation and his interview that focused on three subjects: employment with Cavalier Coach Trailways, employment with Barnes and Noble and his family relationships:
 - Cavalier Coach Trailways - Mr. Monteiro was asked twice about his experience at Cavalier Coach. Mr. Monteiro said that after taking the job, he learned of another better paying job at Paul Revere, gave notice and left the job after about a month and started with Paul Revere a few months later. As Mr. Monteiro was preparing to leave the interview, Dr. Brown brought up the Cavalier Coach job for a third time, stating that he had been told that Mr. Monteiro had "walked off the job". Mr. Monteiro "wondered" why Dr. Brown kept bringing up this subject and "proceeded to reassure this evaluator that the information I had received was inaccurate, and repeated that he had given notice". Some time thereafter, Dr. Brown asked the BPD to confirm or disconfirm the accuracy of the background investigation information concerning Mr. Monteiro's employment at Cavalier Coach. On or

about September 24, 2013, Dr. Brown was informed that a BPD Investigator had spoken to the "President and owner" of the company who stood by "what her manager...stated".

- Barnes and Noble - Dr. Brown noted Mr. Monteiro's eight years of employment and questioned him about his decision to leave after not receiving a promotion and reported that Mr. Monteiro could not identify "what his employer found wanting" (referencing that Dr. Scott (one of the psychological evaluators in a prior bypass) had reported that Barnes and Noble "would not rehire the applicant". Dr. Brown could not "determine the basis and circumstances surrounding Mr. Monteiro's separation from Barnes and Noble".
- Family Relationships - Mr. Monteiro "emphasized his close relationship with both his children", from relationships with two women. He described his breakup with his first relationship as due to the girlfriend's decision to move back with her mother and "alluded" to other issues.

Dr. Brown mentioned Mr. Monteiro's current job at Paul Revere Transportation but did not report any substantive discussion about his work there.

26. As to the psychological test results, Dr. Brown extracted the following statements from the computer-generated narratives:

- The MMPI-2RF raised concerns about under-reporting. The applicant "presented himself in an extremely positive light by denying many faults and shortcomings that most people would acknowledge" and presented a level of virtue and adjustment that is "relatively rare in the general population".

- The PAI results indicated that the applicant is a moderate risk (25%) of receiving a “poorly suited” rating and is a “high” risk for job relevant problems related to Integrity and Anger Management. The applicant tested as a “Cold Submission”.
27. Dr. Brown concluded that the “inconsistency” between how Mr. Monteiro described his separation from Cavalier Coach and what was reported to the BPD investigators reflects “problems relating to integrity in this applicant”. He also concluded that Mr. Monteiro had problems “in the domain of impulsivity and decision-making” shown by “impulsively leaving jobs” and by attempting “to deny and/or conceal such tendency”. Dr. Brown recommended a second opinion.
 28. Dr. Donald Seckler is a clinical psychologist and has evaluated candidates as a first level screener for various police departments in Massachusetts since 1979. Dr. Seckler is the second level screener at BPD, the only department for which he was a second-level screener.
 29. On October 8, 2013, Mr. Monteiro met with Dr. Seckler for his second opinion psychological screening. On October 27, 2013, Dr. Seckler issued his report to the BPD recommending that Mr. Monteiro should be bypassed.
 30. Dr. Seckler’s report acknowledges that Mr. Monteiro’s background investigation record generated by the BPD is “voluminous” and states that he referenced “only those data germane to current findings”. The report then proceeds to describe Mr. Monteiro’s two prior bypasses, including (1) Dr. Scott’s findings that he was “financially unstable, and has associated with criminals” and (2) “has a substantial motor vehicle record”. Dr. Seckler reported that Mr. Monteiro’s answers to questions keyed to two particular scales (the “L”

and "K" scales) on the MMPI 2-RF showed that he was "defensive" in his answering of his test questions, which means that he answered test questions in a manner designed to make him 'look good', which called into question the validity of the test results. On the PAI, Mr. Monteiro had "endorsed" a well-above-average number of critical items, scoring in the 91st percentile, and had high scores for clinical scales that flagged issues about depression, somatic problems, and aggression".

31. During his interview with Mr. Monteiro, Dr. Seckler inquired about leaving the job at Barnes and Noble and why he had not been promoted to store manager. Dr. Seckler states in his report, "When I asked a probing question about why he thought he had been passed over, he said that he didn't know. When I asked if he thought it was because he had a foreign accent, he said, 'Is that what you think?' When I responded 'I don't know, I just

wondered what ideas you may have about it', he said, pointedly, 'Is that what you think?'

32. Dr. Seckler concludes:

"Mr. Monteiro was seen as defensive on the MMPI 2 RF. He was seen as likely to be aggressive on the PAI. He has a substantial record of motor vehicle issues. His ex-employer claims that he lied when stating that he gave notice before leaving his job at Trailways. He was defensive in his interview... Mr. Monteiro's defensiveness and lack of candor are traits that do not suit him for a job with the BPD. Candor is the rock on which police work is founded... Since this characteristic is an important component of the police role...Mr. Monteiro should be bypassed for the job."

33. The last motor vehicle incident for which Mr. Monteiro was found responsible was in 2000.
34. Mr. Monteiro did get into a fight when he was in high school, which he disclosed in his BPD application. Dr. Seckler could point to no history of aggressive behavior by Mr.

Monteiro. When asked to explain what led him to believe that Mr. Monteiro had problems with aggression, he pointed to Mr. Monteiro's responses to test questions in which Mr. Monteiro answered "False" to questions such as "it takes a lot to make me angry" and "my temper never gets me into trouble", which he interpreted to represent an admission that he is "angrier than most people". Dr. Seckler also claimed that Mr. Monteiro's "defensiveness" in responding to questions about his employment and family history during his psychological interviews "was a form of aggression", although there was no accompanying physically offensive gesturing or demeanor.

35. Dr. Seckler acknowledged that, despite the PAI test scores that flagged concerns in the areas of depression, somatic behavior and suicidal tendencies, Mr. Monteiro was not a depressed person and Dr. Seckler saw nothing in his history to suggest somatic or suicidal

tendencies.

36. Dr. Seckler also acknowledged that he had been mistaken in his belief that Barnes and Noble had been "turned off" by Mr. Monteiro and would not be rehired as Dr. Scott incorrectly reported. He had no recollection of seeing the statement to the contrary in the BPD investigator's report and acknowledged that this information was "positive information from an important source".
37. On February 7, 2014, BPD informed Mr. Monteiro that his psychological screening results indicated that he could not adequately perform the essential functions of a police officer, and, therefore, would not be appointed as a Boston Police Officer.
38. Mr. Monteiro duly filed this appeal on March 28, 2014.

DISCUSSION

G. L. c. 31 § 44 grants any person or entity who is aggrieved by a decision of any agency in a judicial review of administrative proceedings the right to appeal the decision to the Superior Court. When reviewing an administrative appeal, “the court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.” *Id.* This Court may reverse the agency judgment “if it determines that the substantial rights of any party may have been prejudiced because the agency decision is unsupported by substantial evidence; or arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.” G. L. c. 30A, § 14(7) (g); City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct 300.

Two principles of law, the first generally applicable to all bypass appeals, the second concerning the consideration of psychological opinions, directed the Commission’s consideration of Monteiro’s appeal, and similarly guide this court in its review.

In City of Beverly v. Civil Service Comm’n, 78 Mass. App.Ct. 182, 187- 188 (2010), the Appeals Court restated that a “city could bypass...if it had ‘reasonable justification’ to do so...the city had the burden of establishing by a preponderance of the evidence that it had such a reason...This means that it needed to demonstrate thaat its decision was ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’” *citations omitted.*

In Police Dep't of Boston v. Kaveleski, 463 Mass. 680, 6— (2010), the SJC considered when, and if, the Commission impermissibly substituted its judgment for that of the appointing authority which accepted the disqualifying findings of the psychologist, or properly exercised its role as fact finder in rejecting the opinion of the expert as not sufficiently factually supported. In Kaveleski, the court found that the rejection of the department's expert's finding of *unfitness for duty* did not imply a conclusion of *fitness* for the same.

Distilling the Commission decision to the most material issue before the court is its refusal to credit the “totem pole” hearsay concerning the claim that Monteiro “walked off the job” at Cavalier Coach, and the *Brown* finding that Monteiro lacked candor in disclosing his reasons for departing Barnes and Noble after eight years of employment.

As the *Kaveleski* Court noted, *id.* at 688, “the law should not, and does not, give the opinions of experts on either side...[a]n issue the benefit of conclusiveness, even if there are not contrary opinions, introduced at trial.... That a person qualifies as an expert does not endow his testimony with magic qualities.” *citations omitted*.

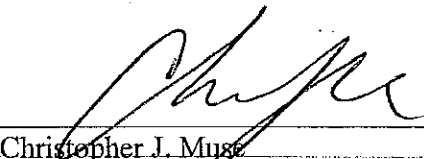
In this case the Commission credited the employment reasons offered by Monteiro, (which were benign), and in a reasoned and thoroughly supported statement (decision pp. 16-19) justified its conclusion that Dr. Seckler's opinions were unreliable. The Commission found that the Department did not sustain its burden by proving justification for Monteiro's bypass, that is, “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” City of Cambridge *Id.* at 304.

This is not a case of the Commission substituting its judgement for that of the Department. Insuring fairness and objectivity throughout the appointment process for certain public employees is the obligation of the Commission, and consistent with its powers and duties enumerated in G.L. c. 31 sec. 2(b). It's decision, therefore, must be UPHELD.

ORDER

Based on the foregoing, Plaintiff's Motion on the Pleadings is DENIED, Defendant's Cross Motion is ALLOWED, the Department's decision not to appoint Monteiro as a police officer is VACATED, and the Commission's decision is hereby UPHELD.

June 30, 2015



Christopher J. Must
Justice of the Superior Court